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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HARRY WILLIAM O'NEAL,

Petitioner,

v.

MIKE KENNEY,

Respondent.

Case No. C08-5490BHS/JKA

REPORT AND
RECOMMENDATION

**NOTED FOR:
October 31, 2008**

This habeas corpus action, filed pursuant to 28 U. S.C. 2254, has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. After review of the petition, the court entered an Order to Show Cause why the petition should not be dismissed with prejudice as time barred (Dkt # 5). In response petitioner has filed a motion to voluntarily dismiss the petition without prejudice (Dkt # 7).

Fed. R. Civ. P. 41 allows a plaintiff or petitioner to voluntarily dismiss an action prior to the filing of an answer. Here, the petition has not been served and petitioner may dismiss this action without leave of court. Accordingly, the motion to dismiss the action without prejudice should be

1 **GRANTED.**

2 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
3 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.
4 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
5 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
6 72(b), the clerk is directed to set the matter for consideration on **October 31, 2008**, as noted in the
7 caption.

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9 DATED this 9 day of October, 2008.

10 /S/ J. Kelley Arnold
11 J. Kelley Arnold
12 United States Magistrate Judge
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